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TRANSMITTAL OF APPEAL BRIEF

Docket No.
ADI-005

In re Application of: Jeffrey E. Gebhard

| Application No. | Filing Date | Examiner | Group Art Unit |
|------------------------|--------------|----------------|----------------|
| 09/328,749-Conf. #7235 | June 9, 1999 | A. D. Stashick | 3728 |

Invention: TORSION SYSTEM FOR AN ARTICLE OF FOOTWEAR

TO THE COMMISSIONER OF PATENTS:

Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal filed: August 14, 2006.

The fee for filing this Appeal Brief is \$ 500.00.

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Dated: October 16, 2006



PATENT
Attorney Docket No. ADI-005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Gebhard **CONF. NO.:** 7235
SERIAL NUMBER: 09/328,749 **ART UNIT:** 3728
U. S. FILING DATE: June 9, 1999 **EXAMINER:** Stashick, A. D.
TITLE: Torsion System for an Article of Footwear

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BRIEF ON APPEAL UNDER 37 C.F.R. § 41.50(b)

This Appeal Brief is submitted in support of the appeal from the Primary Examiner's non-final Office action (hereinafter "Office action") mailed February 14, 2006. A fee for filing of the Appeal Brief is submitted herewith. Appellant believes that no other fee is required for this submission to be entered. However, please consider this a conditional authorization to charge any related fees necessary for entry of this submission to Deposit Account No. 07-1700.

Appellant briefly summarizes the procedural history of this application, prior to the present Appeal. Appellant appealed from a final Office action issued on January 24, 2003, in which the Examiner rejected claims 1-4, 6-21, and 23-26 as unpatentable in view of various combinations of references.¹ On Appeal, the Board reversed the Examiner's rejections on all counts. Decision at 1. Pursuant to its authority under 37 C.F.R. § 41.50(b), the Board entered a

¹ Claims 5 and 22 have been cancelled. Claim 6 was not at issue on the first Appeal. *Ex parte Gebhard*, Decision on Appeal, Appeal No. 2005-2544, at 9 (October 31, 2005) (hereinafter "Decision").

new ground of rejection, rejecting only claims 1, 9, 15, 20, and 26 as anticipated by U.S. Patent No. 4,922,631 to Anderie (hereinafter “Anderie”). *Id.* Appellant filed an Amendment and Response under 37 C.F.R. § 41.50(b)(1) on December 21, 2005, amending the claims and presenting arguments to overcome the Board’s new ground of rejection based on the interpretation of the claims described in the Decision. In the Office action, the Examiner maintained the Board’s rejection of the claims, and issued new rejections of claims 2-4, 6-8, 10-14, 16-19, 21, and 23-25, in view of Anderie and other references already considered by the Board.

Appellant notes that this paper is submitted in response to a non-final Office action. 37 C.F. R. § 41.50(b)(1) provides that, when the Board reverses an Examiner on Appeal and issues a new ground of rejection pursuant to 37 C.F. R. § 41.50(b), the Appellant may amend the claims to overcome the new ground of rejection. Should the Examiner still maintain the Board’s rejection, the Appellant may again appeal. Accordingly, Appellant submits that this Appeal is proper.

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REAL PARTY IN INTEREST

The real party in interest is adidas International, B.V., the assignee, pursuant to an assignment recorded in the records of the U.S. Patent and Trademark Office on July 30, 1999, at Reel 10129, beginning at Frame 0767.

RELATED APPEALS AND INTERFERENCES

The Appellants, the Appellants' legal representative, and assignee are unaware of any other appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

This appeal involves claims 1-4, 7-21, and 23-26. Claims 5 and 22 have been cancelled. Claim 6 is not being appealed.²

STATUS OF AMENDMENTS

No amendment has been filed in response to the Office action dated February 14, 2006.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 is directed to a torsion system (Figure 1, RD³ 5; p. 5, ll. 17-18⁴) for a cycling shoe (Figure 1, RD 1; p. 5, l. 17). The shoe includes a sole with a forefoot area and a rearfoot area. The torsion system has a longitudinal axis (Figure 1, RD 15; p. 5, l. 25), a forefoot portion (Figure 1, RD 16; p. 5, ll. 18-19), a rearfoot portion (Figure 1, RD 14; p. 5, ll. 18-19), and an

² Claim 6 was not previously appealed; thus, Appellant believes it is not ripe for Appeal under 37 C.F.R. § 41.50(b)(1).

³ Citations to the figures include the reference designator ("RD") where applicable, and refer to the figures as filed.

intermediate portion (Figure 1, RD 12; p. 5, ll. 18-19). The forefoot portion spans substantially the entire forefoot area of the sole from a midtarsal area to a toe area and from a lateral side to a medial side, and has a generally smooth concave contour along the longitudinal axis. The rearfoot portion spans substantially the entire rearfoot area of the sole from the midtarsal area to a heel area and from the lateral side to the medial side. The intermediate portion couples the forefoot portion and the rearfoot portion, and is constructed of a material and configured to allow, in a pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis. P. 5, ll. 19-20; p. 3, ll. 1-3; p. 6, ll. 4-8. The intermediate portion also includes a rib that projects beyond a bottom most surface of the torsion system. Figures 1 and 2E, RD 20; p. 6, ll. 2-4.

Claim 21 is directed to a cycling shoe (Figure 1, RD 1; p. 5, l. 17) that includes a torsion system (Figure 1, RD 5; p. 5, ll. 17-18) and a sole with a forefoot area and a rearfoot area. The torsion system includes a sole plate (Figure 1, RD 10; p. 5, ll. 22-23) rigid in a horizontal plane. The sole plate has a longitudinal axis (Figure 1, RD 15; p. 5, l. 25), a forefoot portion (Figure 1, RD 16; p. 5, ll. 18-19), a rearfoot portion (Figure 1, RD 14; p. 5, ll. 18-19), and an intermediate portion (Figure 1, RD 12; p. 5, ll. 18-19). The forefoot portion spans substantially the entire forefoot area of the sole from a midtarsal area to a toe area and from a lateral side to a medial side, and has a generally smooth concave contour along the longitudinal axis. The rearfoot portion spans substantially the entire rearfoot area of the sole from the midtarsal area to a heel area and from the lateral side to the medial side. The intermediate portion couples the forefoot portion and the rearfoot portion, and is constructed of a material and configured to allow, in a

⁴ Citations to paragraph and line numbers refer to the application as filed.

pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis. P. 5, ll. 19-20; p. 3, ll. 1-3; p. 6, ll. 4-8. The intermediate portion also includes a rib that projects beyond an adjacent surface of the torsion system. Figures 1 and 2E, RD 20; p. 6, ll. 2-4.

Claim 26 is directed to a torsion system (Figure 1, RD 5; p. 5, ll. 17-18) for a cycling shoe (Figure 1, RD 1; p. 5, l. 17). The shoe includes a sole with a forefoot area and a rearfoot area. The torsion system has a longitudinal axis (Figure 1, RD 15; p. 5, l. 25), a forefoot portion (Figure 1, RD 16; p. 5, ll. 18-19), a rearfoot portion (Figure 1, RD 14; p. 5, ll. 18-19), and an intermediate portion (Figure 1, RD 12; p. 5, ll. 18-19). The forefoot portion spans the forefoot area of the sole and has a generally smooth concave contour along the longitudinal axis. The rearfoot portion spans the rearfoot area of the sole. The intermediate portion couples the forefoot portion and the rearfoot portion, and is constructed of a material and configured to allow, in a pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis. P. 5, ll. 19-20; p. 3, ll. 1-3; p. 6, ll. 4-8. The intermediate portion also includes a rib that projects beyond an adjacent surface of the torsion system. Figures 1 and 2E, RD 20; p. 6, ll. 2-4. The rib tunes torsionability of the cycling shoe. P. 5, ll. 1-4.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether Anderie teaches or suggests a torsion system comprising, *inter alia*, “a rib that projects beyond a bottom most surface of the torsion system,” as recited in claim 1.
2. Whether Anderie teaches or suggests a torsion system comprising, *inter alia*, a “rib [that] tunes torsionability of [a] cycling shoe,” as recited in claim 26.

3. Whether the Examiner's rejections of claims 2-4, 7-8, 10-14, 16-19, 21, and 23-25 in view of references already considered by the Board are procedurally proper.
4. Whether Anderie anticipates claims 8, 10-13, 17, 21, and 24.
5. Whether there is motivation to modify Anderie, or combine Anderie with any other reference already considered by the Board, and thus render claims 2-4, 7, 11-14, 16, 18, 19, 23, and 25 obvious.

ARGUMENT

I. Anderie does not teach or suggest a torsion system comprising, *inter alia*, “a rib that projects beyond a bottom most surface of the torsion system,” as recited in claim 1.

The Board determined that Anderie describes a torsion system that includes an intermediate sole member 101 and a stiffening element 109, the stiffening element 109 including a rib, e.g., 114, 115, or 116, projecting beyond an adjacent surface, e.g., 113, 118, or 119, of the torsion system. Decision at 10. The Board noted that appealed claim 1 (as it stood at the time of the first appeal) only required that the rib project beyond *some adjacent surface* of the torsion system. *Id.* at 11. Accordingly, in the subsequent Amendment and Response, Appellant amended claim 1 to require that the rib “project[] beyond *a bottom most surface* of the torsion system.” Appellant respectfully submits that the “bottom most surface of the torsion system” of Anderie is the interface between the intermediate surface 101 and the outsole 102. *See* Anderie, FIG. 10. As noted in the Amendment and Response, and as apparent in FIG. 10, Anderie does not teach or describe a rib that projects beyond this surface. Indeed, *no portion* of the stiffening element 109, let alone a rib, projects beyond a bottom most surface of the torsion system of Anderie.

The Examiner's position that "[t]he ribs of section 109 . . . would project beyond, i.e., *above*, the bottom most surface of 101" is incorrect and extends beyond any reasonable definition of the term "project beyond." Office action at 4 (emphasis added). The entirety of the stiffening element 109 is completely contained within the intermediate sole member 101, and the Examiner's position that a location "beyond the bottom most surface of the torsion system" can encompass a location entirely above the bottom surface is absurd. Appellant has defined a "bottom most surface of the torsion system" and claimed a rib that "projects beyond" this surface. Accordingly, a rib that "projects beyond" the recited "bottom most surface" would clearly project *below* the surface, not above the surface, as the Examiner has asserted. In fact, by the Examiner's definition, a foot contained within a shoe can be said to "project beyond the bottom most surface of the shoe," merely because the foot is *above* the bottom most surface. This interpretation is clearly wrong and can not stand; accordingly, Appellant respectfully requests reversal of the Examiner's rejection of amended claim 1 in view of Anderie.

II. Anderie does not teach or suggest a torsion system comprising, *inter alia*, a "rib [that] tunes torsionability of [a] cycling shoe," as recited in claim 26.

In the Amendment and Response, Appellant amended claim 26 to recite the subject matter of non-appealed claim 6, which recites a "rib [that] tunes torsionability of [a] cycling shoe." The Examiner has indicated that Anderie anticipates this limitation, but only cites for support a single sentence in the specification that describes how the stiffening element of Anderie can be manufactured by injection molding. *See* Office action at 4. As the Examiner's citation is not directed to tuning of torsionability by the rib, Appellant submits that amended

claim 26 is not anticipated by Anderie, and respectfully requests reversal of the Examiner's rejection of amended claim 26 in view of Anderie.

III. The Examiner's rejections of claims 2-4, 7-8, 10-14, 16-19, 21, and 23-25 are procedurally improper.

In its Decision, the Board overturned every rejection that the Examiner made in the final Office action, and issued a new ground of rejection in accordance with 37 C.F.R. § 41.50(b). Decision at 9. Appellant, in turn, amended the claims to overcome the rejection. The Examiner, in the subsequent Office action, should only have addressed the claims rejected by the Board and was not entitled to make other grounds of rejection *on references already considered on appeal*. The Manual of Patent Examining Procedure is clear: the Examiner may only make new rejections "if the examiner has specific knowledge of *a particular reference or references* which indicate nonpatentability of any of the appealed claims as to which the examiner was reversed." MPEP § 1214.04 (emphasis added).

The Examiner asserts that "the Board decision did not reverse the examiner on the combination of references used with respect to Anderie only," Office action at 2, implying that this "inaction" provides justification for his new rejections based on different combinations of the same references. This position contradicts the plain language of the MPEP. The MPEP does not indicate that the Examiner may issue a new ground of rejection based on combinations of references *already considered* by the Board on appeal. The Board reversed the Examiner on all counts and issued a new ground of rejection for only five claims. The procedures are clear: in the face of the Board's complete reversal of the Examiner and issuance of a new ground of rejection, the Examiner may raise additional grounds of rejection only "if the examiner has

specific knowledge of *a particular reference or references* which indicate nonpatentability of any of the appealed claims as to which the examiner was reversed.” A new ground of rejection by the Board does not grant the Examiner *carte blanche* to mix and match references already considered by the Board to obtain new grounds of rejection.⁵ The Examiner has identified no new reference or references, therefore, the rejections of claims 2-4, 7-8, 10-14, 16-19, 21, and 23-25 should be withdrawn.

IV. Anderie does not anticipate claims 8, 10-13, 17, 21, and 24.

Even if the rejections of claims 8, 10-13, 17, 21, and 24 stand, which they can not, Appellant respectfully submits that Anderie does not anticipate these claims. At page 9 of the Decision, the Board identifies *only* claims 1, 9, 15, 20, and 26 as anticipated by Anderie. Had the Board determined that Anderie alone rendered any other claims anticipated, it would have rejected those claims as well.⁶ With his “new” rejections, the Examiner has merely applied Anderie *alone* to claims where his rejections based on the combination of Anderie, Dubner, and Kraeuter were overturned.

In the most egregious example, the Examiner has rejected independent claim 21 in view of Anderie. The Board specifically noted “the recognized special characteristics of a ‘cycling shoe,’” and flatly rejected the Examiner’s contention that any shoe used to pedal a bicycle can be a “cycling shoe.” Decision at 8. None of Anderie, Dubner, and Kraeuter disclose a cycling shoe. Nevertheless, the Examiner issued a “new” rejection of claim 21 in view of Anderie alone, clearly ignoring the “recognized special characteristics of a ‘cycling shoe,’” as specifically noted

⁵ Appellant also notes the MPEP’s admonition against performing new searches in the face of a complete reversal to uncover new or better references. MPEP 1214.04.

by the Board. In view of the above arguments, Appellant submits that claims 8, 10-13, 17, 21, and 24 are not anticipated by Anderie, and respectfully requests reversal of the Examiner's rejection of those claims in view of Anderie.

V. There is no motivation to modify Anderie, or combine Anderie with any other reference already considered by the Board; therefore, claims 2-4, 7, 11-14, 16, 18, 19, 23, and 25 are not obvious.

Even if the rejections of claims 2-4, 7, 11-14, 16, 18, 19, 23, and 25 stand, which they can not, Appellant respectfully submits that the Examiner has failed to make a prima facie case of obviousness of the enumerated claims. The Board noted that the Examiner has used the "claimed invention as a template to pick and choose among isolated disclosures . . . and then piece those disparate disclosures together in an effort to render [the] claimed invention obvious." Decision at 6-7. The Examiner's "new" rejections suffer the same shortcomings. The Examiner has merely applied Anderie *alone* to claims where his rejections based on the combination of Anderie, Dubner, and Kraeuter were overturned due to lack of motivation to combine the references. *See* Decision at 7-8.

Additionally, the Board determined that there was no motivation to apply Nagano or Eisenbach to cure the deficiencies of the combined teachings of Anderie, Dubner, and Kraeuter, Decision at 9, yet the Examiner now simply has combined Anderie with Nagano or Eisenbach where his combinations of Anderie, Dubner, and Kraeuter, and Nagano or Eisenbach were overturned.⁷ Thus, with his rejections of claims 7, 23, and 25 in view of Anderie and Eisenbach

⁶ Any assumption to the contrary requires the presumption that the Board only selected claims 1, 9, 15, 20, and 26 at random, and did not consider whether Anderie would anticipate any other claims. This is clearly untenable.

⁷ Indeed, paragraphs 5, 6, and 7 in the Office action are merely regurgitations of paragraphs 3, 4, and 7 in the previously-appealed final Office action, with Anderie substituted for the rejected combination of Anderie, Dubner, and Kraeuter.

or Nagano, the Examiner appears to take the position that, while a combination of five references does not render the claims obvious (as determined by the Board), a combination of just three of those references does. In view of the above arguments, Appellant submits that claims 2-4, 7, 11-14, 16, 18, 19, 23, and 25 are not rendered obvious by any modification of Anderie, or by the combination of any already-considered reference with Anderie, and respectfully requests reversal of the Examiner's rejection of those claims in view of Anderie.

CONCLUSION

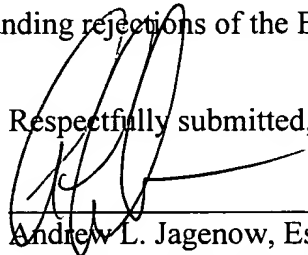
Appellant respectfully submits that, in light of the foregoing remarks, the amendments overcome the Board's rejection, and the new grounds of rejection by the Examiner are procedurally improper. If the new grounds of rejection are deemed procedurally proper, Appellant submits that they are inadequate for the reasons identified in the Decision and above. Appellant respectfully requests reversal of all outstanding rejections of the Examiner.

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Respectfully submitted,



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CLAIMS APPENDIX

1. A torsion system for a cycling shoe including a sole with a forefoot area and a rearfoot area, the torsion system including a longitudinal axis and comprising:

a forefoot portion of the torsion system spanning substantially the entire forefoot area of the sole from a midtarsal area to a toe area and from a lateral side to a medial side, the forefoot portion having a generally smooth concave contour along the longitudinal axis;

a rearfoot portion of the torsion system spanning substantially the entire rearfoot area of the sole from the midtarsal area to a heel area and from the lateral side to the medial side; and

an intermediate portion of the torsion system coupling the forefoot portion and the rearfoot portion, and constructed of a material and configured to allow, in a pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis, wherein the intermediate portion includes a rib that projects beyond a bottom most surface of the torsion system.

2. The torsion system of claim 1, wherein the forefoot portion and rearfoot portion rotate between about 5-25 degrees relative to each other about the longitudinal axis at 35 Newtons of torsional load.

3. The torsion system of claim 1, wherein the forefoot portion and rearfoot portion rotate between about 10-20 degrees relative to each other about the longitudinal axis at 35 Newtons of torsional load.

4. The torsion system of claim 1, wherein the forefoot portion and rearfoot portion rotate about 10 degrees relative to each other about the longitudinal axis at 35 Newtons of torsional load.

5. (Canceled)

6. (Not Appealed)

7. The torsion system of claim 1, wherein the intermediate portion defines at least one circumscribed aperture.
8. The torsion system of claim 1, wherein the rearfoot portion defines at least one aperture.
9. The torsion system of claim 1, wherein the forefoot portion, the rearfoot portion, and the intermediate portion form a single plate.
10. The torsion system of claim 9, wherein the plate is substantially rigid in a horizontal plane.
11. The torsion system of claim 9, wherein the plate is between about 1-15 mm thick.
12. The torsion system of claim 9, wherein the plate is between about 3-10 mm thick.
13. The torsion system of claim 9, wherein the plate is between about 5-8 mm thick.
14. The torsion system of claim 9, wherein a thickness of the plate is less in the intermediate portion than in the forefoot and rearfoot portions.
15. The torsion system of claim 9, wherein a width of the intermediate portion of the plate is narrower than the forefoot and rearfoot portions.
16. The torsion system of claim 9, wherein the plate comprises nylon.
17. The torsion system of claim 9, wherein the plate comprises a composite material.
18. The torsion system of claim 17, wherein the composite material is graphite.

19. The torsion system of claim 17, wherein the composite material is fiberglass.
20. The torsion system of claim 9, wherein the forefoot portion and rearfoot portion comprise material properties different than the intermediate portion.
21. A cycling shoe including a sole with a forefoot area and a rearfoot area and a torsion system, the torsion system comprising:
- a sole plate rigid in a horizontal plane and including a longitudinal axis, the sole plate comprising:
 - a forefoot portion of the sole plate spanning substantially the entire forefoot area of the sole from a midtarsal area to a toe area and from a lateral side to a medial side, the forefoot portion having a generally smooth concave contour along the longitudinal axis;
 - a rearfoot portion of the sole plate spanning substantially the entire rearfoot area of the sole from the midtarsal area to a heel area and from the lateral side to the medial side; and
 - an intermediate portion of the sole plate coupling the forefoot portion and the rearfoot portion and constructed of a material and configured to allow, in a pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis, wherein the intermediate portion includes a rib that projects beyond an adjacent surface of the sole plate.
22. (Canceled)
23. The cycling shoe of claim 21, further comprising an upper.
24. The cycling shoe of claim 21, further comprising an outsole.
25. The cycling shoe of claim 21, further comprising a cleat attachment system disposed on the forefoot portion.
26. A torsion system for a cycling shoe including a sole with a forefoot area and a rearfoot area, the torsion system including a longitudinal axis and comprising:

a forefoot portion of the torsion system spanning the forefoot area of the sole, the forefoot portion having a generally smooth concave contour along the longitudinal axis;

a rearfoot portion of the torsion system spanning the rearfoot area of the sole; and

an intermediate portion of the torsion system coupling the forefoot portion and the rearfoot portion, and constructed of a material and configured to allow, in a pre-selected manner, rotation of the forefoot portion relative to the rearfoot portion about the longitudinal axis, wherein the intermediate portion includes a rib that projects beyond an adjacent surface of the torsion system.

EVIDENCE APPENDIX

None.

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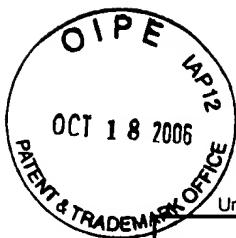
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RELATED PROCEEDINGS APPENDIX

None.

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